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"Non-Tax Legal Issues Associated with the Placement of Wireless Communications Equipment on Church Property"

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With the exploding growth of the wireless communication industry, many congregations are being courted by wireless service providers ("providers") to allow the placement of base stations and antennae on church premises. For the church, the chief benefit of entering into such an arrangement is obvious—it promises to supply a steady stream of income to the church, at minimal effort and cost to the church. There are, however, some serious risks and potential complications that need to be confronted and addressed by any congregation that is considering such a project. The purpose of this memorandum is to highlight those issues.

Two caveats are in order. First, this memorandum does not address the tax ramifications that may flow from receiving income from the placement or use of wireless communications equipment on church property. That issue is the subject of another memorandum that will be circulated by the General Council on Finance and Administration of The United Methodist Church. Second, no representation is made that this memorandum identifies all conceivable non-tax legal concerns associated with entering into contracts with the providers. The intent was to identify what seem to be the key areas of concern to spot the kinds of issues that need to be addressed, without necessarily exhausting them all or treating each one comprehensively. In all cases, a congregation that is contemplating such an arrangement should retain experienced counsel to identify all legal issues that are pertinent to that congregation's situation and to negotiate the best possible agreement with the provider.

Indemnity & Insurance

Indemnity and Insurance. Perhaps the most important thing is to ensure that the provider bears all, or nearly all, of the risks associated with the placement and use of the provider's equipment on the church property. The provider should bear sole responsibility for securing all of the necessary insurance (e.g., casualty, fire, etc.) and should name the church as an additional insured on each policy. Thereafter, the congregation should be vigilant to ensure that the insurance remains in force by, among other things, annually requiring the provider to supply the congregation with a certificate of renewal of the policy for the upcoming period. (The adequacy of fire insurance should be examined closely, particularly if a structure higher than any that previously existed is erected to hold the antenna, since that might increase the risk of fire attributable to lightning.)

In addition, even if seemingly adequate insurance is secured, the church should require the provider to expressly indemnify the church from liability for all claims, losses, costs and damages (including defense costs and attorneys' fees) associated with the construction, maintenance and operation of the project. The scope of risks covered should be comprehensive. At a minimum, the indemnity should cover the following:

Personal injury or bodily injury. This should cover anyone, including parishioners, the provider's employees, contractor employees, neighbors, church employees and anyone else that may use the premises. Please be aware that there is much being written and said about the possibility of adverse health effects being associated with microwave transmissions. Although many believe that exposure levels due to radio frequency emissions from transmitter facilities are well below the levels considered to be safe, the congregation needs to conduct its own inquiry into this issue, to be sure it is aware of all the risks. Whatever the outcome of that assessment, however, it would be advisable to have the indemnity extend not merely to actual bodily injury, but also to claims for increased risk of disease and to any alleged emotional distress that might accompany such risk. Furthermore, the agreement should make clear that the indemnity extends beyond the life of the agreement, covering both claims and injuries that may arise or surface after the arrangement expires.

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Property damage. This should cover the church's own property, of course, but also all property belonging to the provider, any contractors, parishioners, neighbors, or anyone else. Coverage should also apply without regard to the cause of the damage or when it occurred (whether during construction, installation, operation, maintenance, dismantling of the equipment).

Damage arising even from the church's own negligence. Ideally, the indemnity should exclude only damages arising from the church's own gross negligence or intentional misconduct.

Failure to obtain permits or licenses, or otherwise to comply with laws or regulations. The provider must bear all costs arising out of any claimed failure to comply with relevant laws and regulations, including, but not limited to, zoning ordinances, construction permit requirements, and regulations promulgated by the Federal Communications Commission ("FCC").

Claims/liens by contractors. Obviously, the provider should be responsible for paying all contractors hired in connection with installing, maintaining or operating the equipment, and the provider should be required to cure any damage or loss the church may sustain if a contractor claims not to have been paid and asserts claims or liens against the church or its property.

Casualty loss. This would cover any claims or losses associated with any failures or shutdowns of the provider's equipment for any reason, as well as for any other casualty loss, such as those that may be caused by frequency interference or power outages allegedly attributable to the operation of equipment.

Responsibility for Compliance with Laws and Regulations

As suggested by the indemnity discussion, the agreement between the church and provider should firmly place upon the provider the obligation to obtain all permits and licenses that may be needed to construct and operate the equipment, and to ensure that the entire operation otherwise complies with all relevant laws and regulations. In addition, the provider should expressly warrant that the structure will at all times be in full compliance with all applicable laws and regulations and that the provider has obtained all necessary clearances, certificates, and permits.

While obtaining these assurances provides protection for the congregation, government agencies may still consider it to be the church's obligation to fulfill certain requirements. For example, the FCC distinguishes between "owners" and "licensees" of antennas and imposes distinct requirements on each. See Summary of FCC Requirements, below. Although the cost and labor associated with meeting those requirements should be transferred to the provider by agreement, the church may well remain exposed as far as the government is concerned, so the church and its counsel need to monitor the situation to ensure that all requirements are, in fact, satisfied.

Summary of FCC Requirements

The FCC regulates wireless antenna structures pursuant to the federal Telecommunications Act of 1996. The requirements imposed by the Act and by FCC regulations are diverse and should be reviewed closely with counsel at the time any arrangement with a provider is being considered. The requirements include, among other things, the following:

Registration. Subject to certain exemptions, the "owner" of an antenna structure (as distinct from the "licensee"/provider who is using the structure) may be required to register the structure with the FCC if the highest point of the structure is more than 200 feet above ground level, or even if the structure is not that high but is close to an airport. The regulations governing registration are complex and need to be examined closely during the design process. The owner is also responsible for amending the registration data as necessary (e.g., if the structure's height is modified), and for displaying the registration number in a conspicuous place so that it is readily visible near the base of the antenna structure.

The owner is responsible for maintaining the structure in accordance with any specifications and conditions found in the registration (such as painting or lighting requirements imposed to ensure visibility by aircraft pilots).

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The structure must comply with federal regulations governing the environmental and health effects of radio frequency emissions, which can be found at 47 CFR §§ 1.307, 1.310 and 2.1093.

The structure must comply with FCC rules (found generally at 47 CFR § 1.301 et seq.) implementing the National Environmental Policy Act of 1969, which require the preparation of an environmental assessment in certain cases, and which are of particular relevance to any structure located in a flood plain, or on or within an area or building that is listed or eligible for listing in the National Register of Historic Places.

There is a wealth of information available from the FCC regarding these issues. A good starting point is to visit the FCC's web site at www.fcc.gov/wtb.

Other Potential Restrictions

Zoning. Although the Telecommunications Act of 1996 places some important constraints on the jurisdiction of local zoning authorities over such matters, local authorities generally retain the right to regulate the construction, modification and placement of wireless communications equipment.⁽¹⁾ The church's counsel should review the local zoning ordinances and any other applicable regulations (e.g., neighborhood land use agreements or restrictions) to ensure that the specific structure proposed would comply with them.

Charter or Deed Restrictions. There may be language in the church's charter documents, organizational statutes, or property deed that restricts or prohibits it from putting such structures in place. These documents must be referenced to ensure that the placement of and use of income from these structures will not violate any of the restrictions they contain.

Property Tax Issues. Counsel for the church should also consider whether the placement of the equipment on the property, or the receipt of income from the arrangement, may effect the church's status with property taxing authorities.

Responsibility for Costs and Added Expenses

The agreement between the church and the provider should also state that the provider shall bear all out-of-pocket costs associated with the project. Take care that this obligation is stated in comprehensive terms, to make clear that it extends to costs associated with every stage of the venture, including the initial construction/installation phase, maintenance and repair costs, whatever costs may be associated with actually operating the equipment, and any costs incurred if and when the equipment is removed or dismantled.

Utility costs will be a significant operating expense. To limit any squabbles over this issue, the church should insist that the provider install a separate electric meter dedicated to measuring the electricity consumed by the provider's operations.

Coordination Issues

Problems will undoubtedly be minimized if the congregation and the provider take pains to account for issues that, without planning, might prove divisive, disruptive and costly. The key is to anticipate how each party's operations might impact the other, and seek to identify ways in which problems can be avoided or resolved through coordination. Issues that might need this kind of attention include the following:

Installation. The installation of the structure could potentially disrupt church services or other church activities and may require additions or modifications to the existing building. The church should ensure that the structure will be installed at a time and in a manner that is acceptable to the church. To do so, the church may wish to secure an agreement in advance that covers the exact time and manner in which the equipment will be installed. This agreement could outline the location and properties (i.e., size, related-noises, whether it requires use of the church's electricity, potential health hazards, etc.) of all on-site equipment (including machinery and other equipment used during construction), the construction design (including any plans for rewiring or altering existing structures in any way), and the time and manner of construction (i.e., whether services will be affected, whether equipment will be stored on church property, etc.).

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Type/Design of structure. While the provider should be solely responsible for the design and installation of the structure and for ensuring that the structure complies with all applicable laws and regulations, the church will want to conduct its own appraisal to ensure that equipment and its placement is minimally intrusive and aesthetically appropriate and safe, and that it poses no threat to the soundness of the existing structures. To do this, the church should seek detailed plans and specifications from the provider, and condition commencement of installation on approval from the church's own architect and/or engineer. It would also be a good idea for the church to conduct periodic inspections (once a year, at a minimum) to ensure that the structure and equipment have not damaged or compromised the building over time.

Access rights. The church should make itself aware of any rights to access that the service provider would require to install, operate, inspect or otherwise maintain the equipment. If the provider's presence on the property would disrupt church services or other church activities, then the church may seek to limit the provider's access rights during those periods. In addition, the church should be aware of any other access rights that may correspond with the agreement, such as a public utility easement (e.g., where a utility has a legal or contractual right to read an electrical meter or inspect the equipment) or governmental right of access (e.g., where a government agency requires access to the structure in order to determine if it complies with the applicable regulations).

Maintenance and repairs. Although the agreement should require the provider to maintain the structure in good condition, the church should seek to include provisions that allow it to compel the provider to make any necessary repairs or modifications to the structure or equipment if necessary. The agreement should include a manner in which the church will notify the provider should repairs become necessary, the length of time in which the provider is required to respond, and the consequences if the provider fails to respond or refuses to make the necessary repairs.

Burdens on the Church's use or development of the property. The church and the provider need to be very clear on the extent to which any church activities may be limited by the arrangement. The provider may seek to limit or prohibit church personnel from accessing the area in which the equipment is located. The church will need to consider whether any such restrictions will compromise its ability to maintain the property or fulfill any of its functions or missions. The agreement should also address procedures for dealing with situations in which making repairs or improvements to the property impacts the operation of the provider's equipment. For example, will the agreement allow the church to remodel or expand if doing so would require the equipment to be moved or temporarily shutdown? If so, which party bears the costs associated with moving or shutting down the equipment?

Removal of Equipment Upon Termination. The agreement should clearly provide for the disposition of the structure and equipment upon termination of the agreement. The agreement should either expressly require the provider to remove the equipment, or cut-off the provider's rights to the equipment upon termination, so that the church can make any appropriate disposition of the equipment on its own. If the burden of removal is placed on the provider, the agreement should specify the length of time that the provider has to remove the equipment, the consequences if the provider fails to comply, and an indemnification provision that requires the provider to bear all costs and risks associated with removal.

Form, Terms and Duration of Agreement

Form. Agreements between churches and providers typically take the form of a lease. The church's counsel may consider whether some other form has any particular advantage (e.g., a license, which is a privilege to go on another's real property for a particular purpose, but does not confer any title, interest or estate in the property), but the lease form is so commonly used that one might expect providers to be reluctant to adopt a different format.

Compensation. There are several mechanisms by which the church may be compensated under an agreement with a provider, including lump sums and monthly or yearly payments, among other arrangements. While the church can boost its cash flow with a lump sum or one-time payment, doing so may cause the church to forgo potentially greater revenue in the future, should the value of the arrangement increase (e.g., due to increased property values). Compensation arrangements can provide for increasing payments over time and should cover any instance in which the agreement terminates before the end of a pay period. To ensure that the congregation's compensation is competitive, an effort should be made to determine

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the structure and amount of payments that others are receiving from providers in the same area.

Payment arrangements can be creative. For example, we are aware of an instance in which a church without a steeple had one erected at the provider's expense, in exchange for which the church agreed to receive lower fees than it might have if the steeple had already been in place. Another congregation might compromise on compensation in exchange for the provider bearing the expense of making other improvements that increase the value of the property as a whole.

Duration. The church will have to establish the duration of its agreement with the provider, as well any options to extend the agreement. In all likelihood, there will be a minimum period (i.e., a period before which the church will be unable to terminate the agreement), calculated by the provider to ensure a reasonable return in light of the capital outlay required to install the equipment. After negotiating that period, the agreement may allow for one or more optional or automatic extensions of shorter duration, and for early termination of any of those periods.

Transferability. If the provider has the right to assign its lease to another provider, the church may be required to do business with a company that it would otherwise wish to avoid. If the church wishes to deal solely with the original provider, then its agreement with the provider should expressly provide that the provider's interest is non-transferrable. Alternatively, the church may wish to reserve a right to transfer its interest in the lease should the church ever decide to sell all or part of its property. Indeed, the provider itself may well want to ensure that result, by insisting that any sale or transfer of the property be subject to lease.

Compliance with the Book of Discipline

Insofar as the agreement with the provider will constitute an agreement respecting the church's interest in real property, the congregation must also ensure that it complies with the local church property provisions of THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, which are set forth at §§ 2524-2552. Special attention should be paid to § 2540, which lists the steps that must be followed when any real property owned by the church is sold, mortgaged or leased including obtaining approval by the charge conference at a duly-noticed meeting, obtaining the written consent of the district superintendent, and involving the district board of church location and building.

Property Issues

Ownership of the structure and equipment. The agreement should clearly specify who owns what. The church will, undoubtedly, wish to retain title to the steeple or any other pre-existing structure on which an antenna is placed, and to the area on which any of the provider's other equipment may be placed or constructed. But the agreement should also clarify who holds title to any structure or other improvement that is built or made to accommodate or support the equipment. In any case, the agreement should clearly establish the ownership of all property associated with the arrangement, including all pre-existing structures, any improvements and the equipment itself.

Subordination Agreement. The church may wish to include a provision in its agreement which requires or allows (at the church's option) the agreement to be subordinated to any subsequent mortgage. Providers have agreed to such provisions, but sometimes on the condition that the mortgage recognize the validity of the agreement and the provider's right to use the property after any foreclosure.

Burden on Title. Providers typically seek agreements that account for the possibility that the church may be sold to another congregation before the agreement expires. They will want the agreement to state that any such sale of the property shall be subject to the provider's rights under the agreement. The church needs to consider, then, whether the arrangement will restrict the church's ability to sell, transfer or encumber the property as it sees fit. Conversely, if the provider insists that the obligations of the agreement survive any sale of the church property, the congregation might insist that the obligations stay with the land that is, that the congregation will have no further obligations under the agreement once it vacates the premises after selling the property.

Sharing Tower Space, or "Collaction"

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The church may wish to bargain for the right to enter into similar agreements with other providers as a source of additional revenue. This option sometimes called "collocation" would allow other providers to make use of the structures already in place, provided that such would not interfere with any provider's use of or access to the structure. There are limits to how many transmitters a single tower can hold and different tower structures have different limits. In addition, the providers are competitors and some may be unwilling to participate in such sharing arrangements. Other providers, however, may be inclined to allow for collocation from the outset, perhaps as a means of increasing the likelihood of obtaining zoning approval and spreading costs. One must also factor in the effect the additional equipment may have on compliance with radio frequency emission requirements or other potential environmental concerns. In all events, the sharing option should at least be considered.

Again, the foregoing is a summary of issues that need to be considered by a local church when it is considering leasing its premises to a wireless communications service provider. There are undoubtedly other issues that need to be addressed, and the ones discussed above need to be considered in light of the particular situation and any developments in the law. The legal ramifications are diverse and complex, acting with the advice of counsel is essential.

Footnotes

1 The Telecommunications Act precludes local authorities from enforcing regulations that (1) discriminate among providers of functionally equivalent services, (2) prohibit or have the effect of prohibiting wireless services altogether, or (3) impose restrictions based on environmental effects of radio frequency emissions that are more strict than those imposed by comparable federal regulations. 47 U.S.C. § 322(c)(7)(B)(i), (iv).